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ABSTRACT

The obligations of colleges and universities under existing laws prohibiting sex discrimination against employees and students are summarized. Principal federal sources of legal obligation regarding employees are the equal protection clause of the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and Executive Order No. 11246. For students, the principal sources are the equal protection clause and Title IX of the Education Amendments of 1972. Strategies for compliance include the following: (1) carefully select and train key academic and administrative personnel, including faculty on review and search committees; (2) design and disseminate a policy of sexual equity, assign responsibility for its implementation, train line personnel, monitor residual sexual bias, and design and implement remedial programs to ensure compliance with the policy; and (3) complement the steps with indemnification of losses suffered as a result of intentional discrimination. (LB)

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Sex Discrimination Law in Higher Education: The Lessons of the Past Decade

by J. Ralph Lindgren, Patti T. Ota, Perry A. Zirkel and Nan Van Gieson
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During the decade since legal measures barring discrimination on the basis of sex were first made applicable to colleges and universities, it has become increasingly evident that failure to comply with these requirements can be expensive and disruptive. It is not uncommon for the press to carry notices of settlements, in and out of court, that run to hundreds of thousands of dollars. Some universities have been required to operate under court-supervised corrective programs for up to eight years.

The more clearly colleges and universities understand their obligations under existing antidiscrimination laws, the better they will be able to reduce the risk of incurring such costs. Valuable lessons can be learned from the experience of others caught in these legal difficulties.

The purpose of this report is to clarify, to the extent that emerging law allows, the obligations of colleges and universities under existing laws prohibiting sex discrimination. Two parts of the report discuss developments in the law relating to sex discrimination against employees and against students in colleges and universities. The final part identifies three practical and cost-efficient strategies for complying with the law.

What Are the Sources of Obligation Prohibiting Sex Discrimination Against Employees?

At present, the principal federal sources of legal obligation for colleges and universities to avoid sex discrimination against employees are the equal protection clause of the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and Executive Order No. 11246.

Title VII has undergone significant developments during the last decade. The Equal Employment Opportunity Commission (EEOC) called attention to and then published guidelines concerning sexual harassment. Congress passed the Pregnancy Discrimination Act. The Supreme Court interpreted Title VII as forbidding employers' sponsorship of insurance and retirement programs based on sex-based actuarial tables. Lower courts supported the right of academic plaintiffs, under carefully defined circumstances, to have access to the content of confidential peer review files and even votes and began to lend credence to statistical evidence in discrimination cases. Finally, throughout the decade courts uniformly and consistently approved the permissibility of affirmative action programs developed under the executive order against both equal protection and Title VII challenges.

During the decade, plaintiffs continued to be generally unsuccessful in suits brought under the Equal Pay Act, apparently because plaintiffs found it difficult to show, as is required by the act, that their jobs were equal in "skill, effort, and responsibility" to ones performed by better-paid males in similar working conditions.

What Are the Sources of Obligation Prohibiting Sex Discrimination Against Students?

The principal federal sources of legal obligation to avoid sex discrimination against students are the equal protection clause and Title IX of the Education Amendments of 1972. Equal rights amendments to state constitutions and state civil rights statutes have also been used to successfully challenge discriminatory practices in colleges and universities during the past decade.

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Generally speaking, under Title IX all educational institutions receiving federal funds are under obligation to avoid the use of sex as a classifying tool or criterion for decisions or to use other bases of classification that disproportionately disadvantage one sex or the other. During the decade since its adoption, the Supreme Court decided three strategically important questions about Title IX. In 1982, it held that sex discrimination in college and university employment is covered by Title IX. In 1984, the Court ruled that the receipt of federal funds by students is sufficient to make an institution liable under Title IX and that compliance with Title IX applies only to those programs that directly benefit from federal financial assistance. A recent decision by one circuit court is of potentially strategic importance. In 1981, the Seventh Circuit Court of Appeals held that Title IX prohibits only intentional sex discrimination.

Court decisions during the past decade have affected specific areas of student concern. With the exception of private undergraduate colleges, single-sex admissions policies have been virtually prohibited. Tuition rates and financial aid that work to the disadvantage of one sex have been barred. Sex-restricted student organizations, such as all male honor societies, were banned. Separate-but-equal standards were applied to cases involving male and female housing, parietal rules, and athletic teams. During the decade, federal guidelines were issued on the prevention of sexual harrassment of students.

What Strategies are Suggested for Compliance?

This report proposes three strategic measures designed to minimize the risk of liability resulting from sex discrimination, institutional disruption, and expense. The first is to carefully select and train key academic and administrative personnel, including faculty who serve on review and search committees. These people should be trained through briefings and workshops to understand the institution's obligations under antidiscrimination laws. Personnel who resist the full integration of women into the life of the campus require special attention, because they place the institution at serious legal risk.

The second measure proposed is a standard business technique for implementing change called a "management control system." Its five steps including designing and disseminating a policy of sexual equity, assigning responsibility for the implementation of that policy, training line personnel in their new responsibilities under that policy, monitoring the nature and extent of residual sexual bias, and designing and implementing remedial programs to ensure compliance with the policy on a definite timetable.

Although diligently selecting and training personnel and conscientiously implementing a management control system do minimize the risk of liability under antidiscrimination laws, that risk can never be completely eliminated. The third recommendation this report proposes is to complement these steps with indemnification of losses suffered as a result of intentional discrimination. Combined, these steps should minimize the incidence of sex discrimination and the risk of loss resulting from it.

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